Missouri Department of Natural Resources

MINUTES OF THE
LAND RECLAMATION COMMISSION MEETING

March 27, 2003

Chairman Ted Smith called the meeting to order at 10:00 a.m. at the Missouri Department of Natural Resources, 1738 East Elm Street, Jefferson City, Missouri.

Commissioners Present: Ted Smith; Jim DiPardo; Mimi Garstang; Kevin Mohammadi; Gerald Ross; and Hugh Jenkins.

Staff Present: Larry Coen; Dennis Stinson; Richard Hall; Mike Larsen; Bill Zeaman; Richard O'Dell; Larry Hopkins; Greg Sharp; Steve Femmer; Tim Thorn; Andy Reed; Rexroy Scott; Trish Sillman; and Shirley Grantham.

Others Present: Amy Randles, Attorney General's Office; Steve Rudloff, Missouri Limestone Producers Association; Steve Preston, Office of Surface Mining; Kim Dickerson, Associated Electric Coop., Inc.; Brett Geger, APAC; Ginger Steinmetz and Randy Scheer, Mining Industry Council; and David Keller, Harbison-Walker.

1. MINUTES OF THE JANUARY 30 AND MARCH 7, 2003, MEETINGS

Mr. Ross made the motion to approve the Minutes as written. Mr. DiPardo seconded; motion carried unanimously.

2. PRESENTATION OF RESOLUTION

A Resolution was read for presentation to Dennis Wardell for his service to the Land Reclamation Program, the Commission, and the State of Missouri.

3. PERMIT ISSUES

Palmer Limestone Permit Renewal (Attachment 1). Mr. Scott stated this permit renewal is for the company's operation to extract coal on 8 acres in Vernon County and is exempt from the provisions of the Surface Coal Mining Law, but is regulated under the Strip Mine Law. A Strip Mine Law permit is issued on an annual basis and always expires on December 31 of any given year. The Program received a renewal application from Palmer Limestone on December 31, 2002. The Strip Mine Law states that the Staff Director has 30 days after an application is received to recommend to the Commission whether they should issue or deny the permit. The Staff Director has recommended that the renewal permit be issued to Palmer Limestone which was also published in a

newspaper of general circulation in Vernon County. Mr. Scott noted that no public comments were received during the 30-day comment period. Therefore, the staff recommends that the Commission renew Permit OL95-01 for Palmer Limestone for the 2003 calendar year.

Mr. Ross made the motion the Commission issue the renewal permit for Palmer Limestone for the calendar year 2003. Ms. Garstang seconded; motion carried unanimously.

Report on Annual Reclamation Summaries for Coal for 2002 (Attachment 2). Mr. Scott presented this report to the Commission. He stated that per the regulations, all permanent program coal mine operators are required to submit an Annual Reclamation Status Report to the Program by January 31 of each year. The information in the reports is used to detect trends in mining and reclamation, record the status of disturbance and reclamation, record reclamation time frames, and provide background information and historical perspective at the time of bond release. Mr. Scott stated that the Missouri's net production of coal is down 54 percent in 2002 compared to what was mined in 2001.

Update of Permitting Reviews (Attachment 3). Mr. Scott presented this update to the Commission.

Mr. Smith asked how has industry responded to the backlog?

Mr. Scott stated that most of the companies have been cooperative and understand that the Program must do research and coordinate with other agencies.

Staff Time Frames on Permit Reviews (Attachment 4). Mr. Scott stated that at the January 30, 2003, Commission meeting, the staff presented its plan to adhere more strictly to the Commission's Administrative Guidelines regarding response time allowances for technical reviews. Due to increasingly delayed company response times, a need to continuously improve the permit review process, and the potential for extended periods of noncompliance to the permit, it was deemed necessary to return to the Program's Administrative Guidelines regarding permit revision requests per advice from the Attorney General's Office. During that meeting, a question was asked about the time that staff takes to respond to operator's requests. In response to this question, the staff has added information as per Attachment 4 showing the number of days each review was held by the Program before providing comments to the company. As indicated, the median time that a review is held before staff's comments are made is 48 days. The median time for response by the company is 111 days.

Mr. Smith asked if there were any comments from industry regarding the issue of staff time frames on permit reviews.

Ms. Dickerson, Associated Electric Cooperative, stated the company has seen an improvement in staff response time back to it. She felt the company would be able to work through the process with the staff with regard to response due within 60 days.

4. MINING ENFORCEMENT ACTIONS

Alternate Fuels, Inc., Cessation Order CO90-01-75 (Attachment 5). Mr. Sharp stated that Notice of Violation P90-01-75 was issued to the company for failure to follow the approved Acid- and/or Toxic-Forming Mitigation Plan by failing to submit data and to conduct additional sampling. On May 15, 2002, Cessation Order CO90-01-75 was issued for the company's failure to abate the violation. The Cessation Order was assessed $750.00 for 30 days or a total of $22,500.00. To date, both the Notice of Violation and Cessation Order remain unabated.

Alternate Fuels, Inc., Cessation Order CO90-01-76 (Attachment 6). Mr. Sharp stated that Notice of Violation P90-01-76 was issued to the company for failure to follow the approved Acid- and/or Toxic-Forming Mitigation Plan by failing to submit data and to conduct additional sampling. On May 15, 2002, Cessation Order CO90-01-76 was issued for the company's failure to abate the violation. The Cessation Order was assessed $750.00 for 30 days or a total of $22,500.00. To date, both the Notice of Violation and Cessation Order remain unabated.

Alternate Fuels, Inc., Cessation Order CO90-01-77 (Attachment 7). Mr. Sharp stated that Notice of Violation P90-01-77 was issued to the company for failure to maintain designed structures. Specifically, the company failed to maintain a diversion that overtopped and allowed water to leave the permit without passing through a siltation structure. On August 1, 2002, Cessation Order CO90-01-77 was issued for the company's failure to abate the violation. The Cessation Order was assessed $750.00 for 30 days or a total of $22,500.00. To date, both the Notice of Violation and Cessation Order remain unabated.

Alternate Fuels, Inc., Cessation Order CO91-02-80 (Attachment 8). Mr. Sharp stated that Notice of Violation P91-02-80 was issued to the company for failure to follow the approved Acid- and/or Toxic-Forming Mitigation Plan by failing to sample or submit data. On May 15, 2002, Cessation Order CO91-02-80 was issued for the company's failure to abate the violation. The Cessation Order was assessed $750.00 for 30 days or a total of $22,500.00. To date, both the Notice of Violation and Cessation Order remain unabated.

Alternate Fuels, Inc., Cessation Order CO96-01-52 (Attachment 9). Mr. Sharp stated that Notice of Violation P96-01-52 was issued to the company for failure to have approval of designs prior to construction of a final water impoundment and also failure to follow the approved reclamation plan by constructing an unapproved water impoundment. On May 15, 2002, Cessation Order CO96-01-52 was issued for the company's failure to abate the violation. The Cessation Order was assessed $750.00 for 30 days or a total of $22,500.00. To date, both the Notice of Violation and Cessation Order remain unabated.

The staff recommends that since all time frames for appeal have expired, that the Commission confirm both the fact of the Cessation Orders and the proposed penalties, as assessed for Alternate Fuels, Inc., as well as authorize the staff to refer the assessments to the Missouri Attorney General's Office for collection if payments are not received within 30 days of receipt of the Orders to pay.

Mr. Ross noted that there were at least three Cessation Orders that involved not following the approved Acid- and Toxic-Forming Mitigation Plan. Are those separate locations on the site or the same?

Mr. Sharp stated they were at separate locations, and the staff did not receive the required data from the company.

Mr. Ross made the motion that the Commission confirm the fact of the Cessation Orders and assess the monetary penalties as presented for the above Cessation Orders and authorize the staff to refer the assessments to the Missouri Attorney General's Office for collection if payment is not received within 30 days of receipt of the orders to pay. Mr. DiPardo seconded; motion carried. Mr. Jenkins abstained from voting.

Alternate Fuels, Inc., Notice of Violation P91-02-81 (Attachment 10). Mr. Sharp stated a July 31, 2002, inspection revealed the company had failed to follow the approved Acid- and/or Toxic-Forming Mitigation Plan by not submitting sampling data and did not conduct sampling on areas of exposed acid/toxic material. As a result, Notice of Violation P91-02-81 was issued. The company had been notified of the sampling requirements on four separate inspections prior to the issuance of the enforcement action. The company was given multiple time frames for the required remedial actions from 5 to 60 days. The violation was assessed a penalty point total of 45 points which corresponds to a monetary penalty of $2,500.00. To date, the violation remains unabated.

Alternate Fuels, Inc., Notice of Violation P96-01-53 (Attachment 11). Mr. Sharp stated that during a file search on April 12, 2002, for information pertaining to insurance for the company's operation, it was noted that it had failed to submit the certificate of insurance

as required. As a result, Notice of Violation P96-01-53 was issued. Prior to the enforcement action, the staff had notified the company in two separate memos that the insurance information was required. The company was given seven days to abate the violation. The violation was assessed a penalty point total of 38 points which corresponds to a monetary penalty of $1,800.00. To date, the violation remains unabated.

Alternate Fuels, Inc., Notice of Violation P96-01-55 (Attachment 12). Mr. Sharp stated that a June 18, 2002, inspection revealed topsoil erosion on the east slope of a final water impoundment. Mr. Sharp stated as a result, Notice of Violation P96-01-55 was issued. The company was required to abate the violation immediately. The violation was assessed a penalty point total of 36 points which corresponds to a monetary penalty of $1,600.00. To date, the violation remains unabated.

The staff recommends that since all time frames for appeal have expired, that the Commission confirm both the fact of the Notices of Violation and the proposed penalties, as assessed for Alternate Fuels, Inc., as well as authorize the staff to refer the assessments to the Missouri Attorney General's Office for collection if payments are not received within 30 days of receipt of the Orders to pay.

Ms. Garstang made the motion that the Commission confirm the fact of the Notices of Violation and assess the monetary penalties as presented for the above violations and authorize the staff to refer the assessments to the Missouri Attorney General's Office for collection if payment is not received within 30 days of receipt of the orders to pay. Mr. DiPardo seconded; motion carried. Mr. Jenkins abstained from voting.

Settlement Agreement, Pace Construction Company, Inc. (Attachment 13). Mr. Larsen stated that following a site inspection in August 2002, two Notices of Violation (190-004 and 190-005) were issued to the company for field deficiencies noted during the inspection. Following receipt of the Notices and assessments, the operator requested an informal conference which was held in November 2002. Following the informal conference, the Staff Director offered a Settlement Agreement affirming both violations. The penalty assessment for Notice of Violation 190-004 was reduced from $1,000.00 to $605.00, and the penalty assessment for Notice of Violation 190-005 was reduced from $1,000.00 to $645.00. The company accepted and signed the Settlement Agreement. Therefore, the staff recommends that the Settlement Agreement be approved by the Commission.

Mr. DiPardo made the motion the Commission approve the Settlement Agreement as presented for Pace Construction Company, Inc. Mr. Ross seconded; motion carried unanimously.

Formal Complaint - Robert Servaes Construction and Quarry, NOV 712-001. Mr. Larsen noted that this item can be removed from the agenda because the operator has fulfilled the requirements of the Notice of Violation by submitting all materials and replacement bonding.

Formal Complaint – Pace Construction Company, NOV 190-004 (Attachment 14). Mr. Larsen stated this violation was issued in September 2002 for failure to stabilize erosion and establish sediment control. Abatement was to have been completed by October 1, 2002. An October 16, 2002, inspection revealed the violation was not abated. In November 2002, an assistance inspection of the site was conducted by the Program Staff Director, the inspector, and company personnel. During this inspection, the outstanding work which needed to be completed was explained to the company. The violation remained unabated. In December 2002, a meeting was held with the Program Staff Director, Program staff, and company personnel. It was agreed that the violation would be modified until January 31, 2003, to allow the company alternate methods to abate the violation. During a March 7, 2003, inspection of the site, it was noted that the earth work had been done, the rock check dam was in place to control sediment; however, the seeding and mulching of the site had not been completed. On March 11, 2003, staff contacted the company who indicated they were working on the issue. The company was informed that the violation needed to be abated as soon as possible and that this Formal Complaint was being issued. As of this date, the violation remains unabated. Mr. Larsen stated he was in contact with the company today and indicated to them that they have an additional two weeks to complete the work, following the receipt of this Formal Complaint, resulting in the removal of the Formal Complaint. Since all regulatory time frames for appeal of the Notice of Violation have expired and the operator has failed to perform the required remedial actions as stated in the Notice, the staff recommends the Commission (1) sign the Notice of Formal Complaint for failure to abate Notice of Violation 190-004 and (2) notify the operator that a formal complaint has been filed and that fifteen days are allowed in which to request a hearing if desired or to remedy the basis of the Formal Complaint. And if the operator finishes the mulching work, the staff will negate the Formal Complaint.

Mr. Smith noted in a prior action the Commission approved a Settlement Agreement that included this violation and lowered the penalty assessment. Now it would appear that a violation is being issued for the same activity? Why an agreement to a settlement if the work had not been done other than January is not a good time to plant grass?

Mr. Larsen stated the Settlement Agreement and the reduction in penalty was not because of good faith. The penalty for Notice of Violation 190-004 was originally assessed at $1,900.00. That is above the maximum amount, but that is how the assessment worksheet came out. The amount of $1,295.00 of that $1,900.00 was an adjustment

factor for the length of time it took the operator to abate a previous violation. Mr. Larsen stated that in the Industrial Minerals rules, there is an adjustment factor based on how long a period of time an operator failed to abate a previous violation; and there is a monetary penalty for that that is added on to the core assessment for any future violations within a two-year period of time. Pace Construction indicated that they were unaware of that adjustment factor and stated to the Program Staff Director that he should not be penalized for something he was not aware of, which was the additional $1,295.00. The Staff Director felt because the operator indicated that he was not aware of the adjustment factor, that that amount should be removed from the penalty assessment. That was the basis for the penalty reduction.

Mr. Larsen also noted that if Pace Construction does not complete the mulching work and he does not request a hearing, the Commission may suspend the operator's permit until this violation is abated—cease all mining until the work is completed—or revoke the permit.

Ms. Garstang asked whether the operator has given any reasons for not completing the work, in light of the staff's several discussions with the operator as to what is needed?

Mr. Larsen stated what work has been done has been done by a contractor and not the company. He noted he did not understand why it has taken the operator this long to do any work. However, 90 percent of the work has been done. The work remaining is the mulching of outslopes which are contributing to sediment and the initial reason for the issuance of this Notice of Violation. Hopefully, the operator now understands what work needs to be completed.

Mr. Ross made the motion the Commission adopt the staff's recommendation and sign the Notice of Formal Complaint on Notice of Violation 190-004 for Pace Construction Company and notify the operator that a Formal Complaint has been filed and that he has 15 days to respond. Mr. Jenkins seconded; motion carried unanimously.

Referral to Attorney General's Office for Injunctive Relief, Tri-City Sand and Gravel (Attachment 15). Mr. Larsen stated this operator is an in-stream sand and gravel mining operation found to be operating without a permit. The operator was instructed in July 2001 to cease all mining until a permit was secured from the Program. Between August 2001 to October 2001, three separate attempts were made to secure a permit application with application materials sent and phone conversations conducted between the staff and the operator. The final due date for submission of an application was November 2, 2001. Notice of Violation 896-001 was issued on January 10, 2002, to this operator for conducting surface mining without a permit. Abatement of the violation required submission of a completed application within 15 days of the operator's receipt of

the Notice. Mr. Larsen noted that numerous unsuccessful attempts were made during 2002 by Sheriff Departments from McDonald and Barry Counties to serve the Notice of Violation on the operator. An address for the operator was located by searching the Arkansas Secretary of State's web site. Service of the Notice of Violation was completed by certified mail on December 20, 2002. The abatement date was January 4, 2003. To date, no application materials have been received from Tri-City Sand and Gravel. Mr. Larsen stated that according to statute, if an operator fails to abate a Notice of Violation issued for unpermitted mining, "…the commission shall request the attorney general to file suit in the name of the State of Missouri for an injunction and civil penalties not to exceed one thousand dollars per day for each day the violation has occurred." The staff recommends that, because the operator has been unresponsive in abating this violation for mining without a permit, the Commission refer this matter to the Attorney General's Office for injunctive relief and appropriate civil penalties.

Mr. Ross asked what is the injunctive relief that would be sought—just prohibiting this operator from operating in the state or is there any recovery of damages other than civil penalties?

Mr. Larsen stated he thought that both the above options could be pursued. It doesn't appear that there has been any damage to the creek. The company was simply operating without a permit.

Mr. Ross made the motion that the Commission approve the staff's recommendation and refer the matter of Tri-City Sand and Gravel to the Missouri Attorney General's Office for injunctive relief and associated civil penalties. Mr. Jenkins seconded; motion carried unanimously.

Enforcement Action Tracking Report (Attachment 16). Mr. Hall presented this report to the Commission.

5. BOND RELEASE REQUESTS

Industrial Minerals:

Summary of Industrial Minerals Bonds Released by Staff Director (Attachment 17). Mr. O'Dell presented this report to the Commission. He stated the Staff Director has reviewed, evaluated, and approved two Industrial Minerals bond release requests since the January 2003 Commission meeting. One request is for a total of 4 acres of Pasture for Fall Valley Stone, Inc., Chesapeake site, for a total release amount of $2,000.00. The second request is for Bailey Quarries at the Chesapeake East site for release of 10 acres Pasture, 6 acres Water, and 7 acres Industrial for a total release amount of $11,500.00.

6. ABANDONED MINE LAND ACTIVITIES

AML Status Report (Attachment 18). Mr. Stinson presented this report to the Commission.

7. OTHER BUSINESS

Proposed Industrial Minerals Rule Amendment (Attachment 19). Mr. Larsen stated this proposed amendment concerns part of the permitting process whenever an Industrial Minerals applicant wants to obtain a mining permit. As part of that process, the applicant is required to give public notification, both to the newspaper and to adjacent and contiguous property owners. During the March 7, 2003, Commission teleconference meeting, the Commission expressed a desire to change the proposed rule that is pending regarding the public notice process on permit applications. The matter involves the process by which an applicant determines which adjacent landowners would receive a certified letter, notifying said landowners of the pending application to surface mine and informing them of their rights to appeal the issuance of the permit. At that meeting, the Commission was informed that they would need to adopt that change in the draft language prior to the proposed rule being filed as required by Missouri statutes. The proposed change in that language is indicated in Attachment 19. It is the staff's recommendation that the Commission approve this change and to allow the rulemaking process to proceed. The Commission decided that adjacent property owners to receive the letters would be those property owners whose properties abut the property in which the mine plan area is located. Regardless of the mine plan area, anyone who has property around that property to be mined is then being considered to be an adjacent property owner. Contiguous means the property has to actually touch the mine plan boundary.

Steve Rudloff, Missouri Limestone Producers Association, stated this issue was addressed in the Industrial Minerals Rules Committee meetings during the past year. It was the Committee's determination that the rules would need to reflect what it felt is stated in the language in the statute that confines notification to those adjacent to the mine plan area. He stated the Committee felt the proposed language in the original rules was the most appropriate. He noted that an operator had contacted him regarding this proposed change. The operator has a large tract of land almost 3,000 acres in size, with a little over 100 acres affected in the middle of the area. The operator felt that the proposed change would be a very onerous burden on their operation. There are other operators that feel the same way.

Mr. Smith stated that the action which the Commission would take today would be nothing more than to authorize staff to proceed with the rulemaking process to make these changes, including any public hearings. Unless the process moved very quickly, it

would not have any impact on any of the pending permits currently under review. Mr. Smith stated it would be to clarify for the future where those notices would go.

Mr. Rudloff stated that his understanding from the operator was that the Program staff was asking that company to comply with what the proposal says today. Perhaps, the Commission needs to clarify what its desire is regarding this issue.

Mr. Smith stated it is his understanding that it becomes a question of what is adjacent to the land and the proposed mine area and how close is adjacent and how does it abut up. The advice received by the Commission was that the interpretation it might expect from a court in a challenge would be that if it abutted the actual, not just the mine plan, but the proposed mine plan area. The word "adjacent" is the question the Commission is trying to get an interpretation of. If an operator submitted a permit and stated that based on his legal counsel, he felt that the property owners were not adjacent, then it would be up to the Commission to really evaluate further. Mr. Smith noted what staff has presented is based on previous advice and that this is the precedence that has been established by the Commission and that the owners should be contacted.

Mr. Ross asked Mr. Rudloff and Mr. Scherr, whether from the sense from the industry, that the burden of identifying who all these owners are and the sending of the letters is an undue burden as well as creating more interest in the proposed permit?

Mr. Rudloff stated he felt the concern from industry originates from several aspects. People adjacent to the area that is going to be actually affected certainly have the right to know what is going on if it is adjacent to their property; someone who is, say, half mile away on the other side of the hill may be adjacent to the company's property, but would most likely have less concern and less impact. If the proposed operation is in a more heavily populated area, the numbers of people that might need to be notified can be substantial, and addresses would need to be tracked down. When we get to the point where someone may appeal the permit issuance, the fact that just one of those individuals did not get a letter or did not sign for it, this raises the odds of being tripped up on this type of technicality on a permit issuance.

Mr. Ross asked Mr. Rudloff if his interpretation of the permitted area is the precise description of the permit?

Mr. Rudloff stated the area identified by the operator and approved by the staff that might have the potential to be affected by the mining operation and there would be future reclamation obligations.

Mr. Ross asked Mr. Rudloff, if the permitted area goes within 5 feet of the property line, then does anyone get notified?

Mr. Rudloff stated that is something that the rules work group did discuss and that it could be a potential issue for someone. In looking at the language in the statute, it was felt that that is what needed to be changed, if the issue needed to be addressed. It could not be dealt with in the regulations.

Mr. Smith asked Mr. Rudloff he had noted that perhaps someone who is half a mile away won't be concerned. What if they are 100 yards away? Is that too close? Perhaps, what the Commission needs to address is a buffer situation. If there are 160 acres in the middle of 3,000 acres and if there is a half mile or miles between it, then would there have to be notice given? It appears questionable that a mine operator can get within 5 feet and say he is not adjacent or contiguous so he does not need to give notice. In past permits before the Commission, very few have gone up to the property line because of the reclamation needs. Would the operator then need to notify anyone? Mr. Smith stated that is the question the Commission has to clarify is how do we draw that line.

Mr. Randy Scherr, Mining Industry Council and Missouri Concrete Association, stated the notification issue was the original reason legislation was introduced. There was discussion during the legislative process about the notification issue and the mine plan area was put in the bill because that was a defined term under Chapter 444. That language in that section, 444.772.10 is: "…and to the last known addressees of all record landowners of contiguous real property or real property located adjacent to the proposed mine plan area." Mine plan area is a clearly defined term under the statute. When the work group discussed this issue, a distance notification was discussed—should it be within 500 feet, 1,000 feet. The consensus at that time was that it was limited by the language in the statute. Mr. Scherr stated from his understanding of those discussions of the work group, that the clarification of contiguous versus adjacent, contiguous was considered as property that abutted up to and was contiguous to, connected with in some fashion, the property that was defined such as the mine plan area. The adjacent was interpreted to be the inclusion of land that might not be contiguous, but might be separated by another right-of-way, whether it be a county road, a state highway, a navigable stream, in some cases where it might not be contiguous to because of that other deeded property but it was public access. Mr. Scherr stated he felt a change would go beyond in terms of the property on which the mine plan area would be included, would go well beyond the statute and might not meet the test of Chapter 536 on administrative rules. He stated his concern is that if there is a 1- or 2-acre clay pit in the middle of a 500-acre farm, who should be notified, where the mine plan area is simply an acre or 2 in the middle of that? If there are 25 acres in the middle of 3,600 acres, who should be notified and how many should be notified? He stated he felt the concern when the legislation was drafted was how many unaffected property owners might fall within that notification if it was contiguous property owners to the property upon which the mine plan area is located. A worst case scenario would be a 10-acre site within 3,600 acres. Mr. Scherr stated his suggestion would be a statutory change to go beyond the contiguous to the mine plan area.

Mr. Smith asked Mr. Scherr, in his use of the word “adjacent” and his referring to immediately opposite from or across the road or right-of-way for some barrier that might be there, would this be a point where a setback or a barrier could be identified as far as within that 1,600 acres and where you would be within 100 yards, is that 100 yards adjacent property? You would be the same landowner, but at what level does it become adjacent?

Mr. Scherr stated, using Mr. Smith’s definition of adjacent, then how far out do you go? He felt the defining term is the mine plan area, which is a term defined in the statute and also used in the notification section of subsection 10. Mr. Sherr stated he felt if it was the legislative intent, that the language would have said land adjacent or contiguous to the property upon which the mine plan area is located. That is not what the law says.

Mr. Smith asked if there is a mine plan and a company wants to expand that permitted area, does the company have to notify landowners for the expansion for that permitted area?

The response was yes. An expansion is treated the same as a new permit.

Mr. Rudloff stated we are referring here to persons to be directly notified in addition to some more general public notice requirements for a newspaper of record. It is not as if persons would not be aware.

Mr. Smith stated then the question of standing—if persons are in adjacent land, do they have standing even though it is so far in and can they request a hearing? They are not separate, and the Commission has to look at the complete picture.

Mr. Scherr stated he believed that the issue of standing is developed or given by a different set of standards, not just adjacent to. There may be persons adjacent to that do not have standing and persons not adjacent to that do have standing because the test under the statute is different for standing for the public hearing.

Mr. Geger, APAC, asked what is the staff currently enforcing as far as public notification of surrounding landowners—is it the proposed change or is it still the persons adjacent or contiguous to the mine plan area or are we to inform everyone in the adjacent area?

Mr. Smith stated that, possibly, it is going to be up to the individual permit holder and the potential that they run for a hearing and will it be challenged in court as far as the definition of adjacent. He felt it would be up to the company’s legal counsel to advise as to how the word adjacent is applied and the actual wording as it states here. Is it the proposed mine plan area or is it the property on which the mine plan is done?

Mr. Coen stated the staff does have to implement the new law, but there are no rules; and the direction given to staff has been to begin to use the proposed rules developed by the work group in order to make sure the law is fulfilled. What the Program will need to do is to tell an operator they need to follow the law and it will be their choice from this day forward. The staff will have to change the advice that it has been giving to operators.

Mr. Larsen stated he felt it was a good idea to continue with the current program that has been followed since last fall. If there is a case-by-case situation where nearby landowners feel slighted by not receiving a letter personally, it should be noted to the operator and it would then be up to that operator whether they proceed to do or not after they consult with their legal counsel. Until rules are finally adopted, this is the approach that should be taken, to continue with the existing understanding of what the law means. There is also the public notification by newspaper, but some persons may feel slighted because they did not receive a personal letter.

Ms. Garstang asked whether the Commission could change the staff's current recommended language and define a buffer as part of the Commission's understanding of adjacent and contiguous?

Mr. Smith stated that is why the staff has recommended the change they did. If the Commission wishes to change the wording or add a buffer to try to accommodate a certain level, that is the right of the Commission.

Ms. Garstang stated it was her understanding that the Commission's concern is that it's more how far away from the actual mining within the property line a company would have to be. The Commission is not questioning notification of persons way outside of the property line; it's more how close to the property line you need to get with the mining before contiguous landowners are contacted, is that correct?

Mr. Smith stated he felt that was correct.

Mr. Ross stated there will have to be a judgment call at some point as to how close to the edge of the property is having an impact on adjacent landowners. He felt the Commission has a choice, either to make a change now or go forward and see what the public comment is and make adjustments if the Commission feels they are needed in the final rule.

Mr. Smith noted the Commission does need to move forward with the new rules package, which includes this issue.

Ms. Randles stated the Commission could make a change in the final version of a rule based upon comments that are received during the rulemaking process, even comments at a hearing.

Ms. Randles stated two different issues have been discussed here today. Comments have been directed not only what should the proposed rules say, questions have been raised about how the process should be handled in the interim. By promulgating these rules, the Commission will be interpreting the statute. She noted some concern about the Commission or the Department of Natural Resources providing too much guidance because the Commission has not yet reached a decision yet as to what its interpretation is. The statute is available for operators to read when making application, but it is a little too early to provide guidance to them of what the staff thinks the statute means because until the Commission decides what its interpretation is, there really isn't a Commission policy on this issue. It is simply the interpretation by the staff.

Mr. Ross stated he felt the Commission needs to get better information on the mine plan area, what the statute said and what the regulations say.

Mr. DiPardo asked whether there is anything in the regulations or when an operator sets up a mine plan that he has to stay a set distance from a property line or a road?

Mr. Larsen stated that requirement is no longer in the rules. It was replaced by road right-of-ways. There are no limiting distances now from the mine plan area up to a fence line.

Mr. Ross asked when speaking of the term "mine plan area," is that the specific permitted area?

Mr. Larsen stated they are two separate things. The mine plan area is just the area an operator plans to mine over a long period of time. The operator may start with a small permitted area within that mine plan area, but it should be noted that the mine plan area is what the operator puts out on public notice. By this notice, the public is notified that over a period of however many years, a particular mining company plans to mine a said amount of acres. The public is not notified of how many acres the operator proposes to initially permit. Notification is only of the mine plan area. Once that is approved by the Commission, a mine plan area will almost always contain a permit area, either matching the mine plan area or within it. The operator can request to amend the permitted area in the future because he has already put the mine plan area on public notice. Both the length of time an operator is going to mine and the number of acres he plans to mine are required in the public notice.

Mr. Ross stated he would like to have more information regarding the mine plan area.

Mr. Larsen noted that Program staff have discussed the idea of a distance to define adjacent. Perhaps, working with industry regarding resolving what that distance is for a mine plan area would be one way to solve this issue.

Ms. Garstang stated she agreed. She did have a concern about what this would do to slowing the progress of filing of the other rules. She stated if that can be done quickly and replace this language and then go forward, this would be her preference.

Mr. Scherr stated he agreed that the rulemaking process needs to move forward. He stated he still felt the rules would have to fit the language of the statute. One suggestion without a statutory change is to define adjacent as land that is contiguous to some distance limit, say, within 500 feet of the property line of something contiguous upon which the mine plan area sits. Industry's concern is that the rules need to be within the frame work of the language within the statute.

Mr. Coen stated the staff could meet with industry for their assistance. Whatever goes into rulemaking, the staff needs to have Commission final approval on the language to go into the final rulemaking.

Mr. Mohammadi made the motion to approve the revised proposed Industrial Minerals rules at 10 CSR 40-10.020(2)(E)2.A. as presented today be incorporated into the proposed rules that are to be promulgated for the rulemaking process and proceed with that process. Mr. DiPardo seconded; Ms. Garstang opposed. Motion carried.

Referral to Attorney General's Office – WMK Materials. Mr. Larsen stated the company is an unpermitted operator conducting mining in southwest Missouri at three different sites, both in-stream and open-pit. The operator was issued three Notices of Violation. Remedial requirements are that all mining be ceased immediately and that permit application materials be submitted to the Program. The deadline to submit these materials was March 26, 2003. The operator has not complied with that deadline. As a result of staff consultation with the Attorney General's Office, it is felt that an injunction be pursued as promptly as possible. Therefore, the staff recommends that the matter be referred to the Missouri Attorney General's Office for injunctive relief and the pursuit of the appropriate civil penalties.

Mr. DiPardo made the motion that the Commission approve the staff's recommendation and refer the matter of WMK Materials to the Missouri Attorney General's Office for injunctive relief and associated civil penalties. Mr. Jenkins seconded; motion carried unanimously.

Policy Concerning Mining vs. Development (Attachment 20). Mr. Larsen stated it is the staff's request that the Commission review an existing policy concerning Mining vs. Development. He noted that when this policy was passed by the Commission in March 1995, it was a two-prong policy: mining vs. development and fill dirt. The Commission has previously reviewed the fill dirt portion of the policy. He presented background

information to the Commission from Commission meetings held between July 1994 and March 1995 regarding this issue. Mr. Larsen stated there are instances in the state where development occurs and there is regulated mineral that may find its way back to the development site as well as being sold. The staff requests that the Commission review the policy, decide whether anything needs to be changed, and advise the staff if it should proceed on a case-by-case basis. It is hoped that action on this policy can be taken at a future Commission meeting.

Mr. Geger, APAC, noted APAC has been subcontracted under another company which is building condominiums in the Lake of the Ozarks area. Until now, these condominiums built in the Lake area have not been regulated by the Land Reclamation Program in the removal of that material. He asked whether the Commission could consider today on a case-by-case basis that APAC be allowed to continue in the manner that they have been subcontracted with the development company until a review of the policy is completed and further direction is determined. APAC currently has a large project in that area with the condominiums being built and marinas and has, in the past, been unregulated. At this point, APAC will be required to obtain a Land Reclamation Program permit for a site that is already permitted with Water Pollution and Air Pollution Programs. APAC feels that a Land Reclamation Program permit is not needed for this site because all impacts have been covered under the two above programs and because, in the time frame that it will take to achieve this Land Reclamation Program permit, it will set APAC back at least 45 days from the public comment period, ending up in a delay of several months. That is quite significant development being held back for a condominium that is being built. He inquired about the possibility of allowing this project to continue in the manner that it has been going until such time as the Commission makes a decision on the above policy.

Mr. DiPardo asked whether APAC is taking excess rock and selling it?

Mr. Geger replied yes. What is taking place at the site is that Johnson Development Company is building a condominium. There is no overburden, but just a highwall of rock that goes down to the water's edge. One company has grubbed out the area and removed the trees, another subcontractor is shooting the rock, and APAC is removing the rock and crushing it and putting it back into the site for development of the condominiums. However, 100 percent of that rock cannot immediately be moved back in, and a certain amount is being sold .

Mr. Smith stated the Commission was not in a position to make such a determination and that APAC and the Land Reclamation Program should work out any problems regarding the above issue.

Land Reclamation Program Employees of the Month for February and March – Mr. Coen noted the LRP Employees of the Month for February and March were Richard O'Dell and Jamie Phelps, respectively.

Closed Session. Mr. Ross made the motion that the Land Reclamation Commission meet in Closed Session at 8:30 a.m. on May 22, 2003, for the purpose of discussing personnel actions and legal actions, causes of actions, or litigation as provided for in Section 610.021, RSMo. Mr. Jenkins seconded; motion carried unanimously.

Adjournment. Mr. DiPardo made the motion that the Land Reclamation Commission meeting be adjourned. Ms. Garstang seconded; motion carried unanimously. The meeting was adjourned at 12:10 p.m.

Respectfully submitted,

Chairman